IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

Notice of Motion No. 911 of 2007
in
Suit No. 1789 of 1988

1. Najma w/o Ramzanali
Rasekhinejad and others ..Plaintiffs

vs.

1A. Abbas Ali s/o Ali Akbar
Safarali Rasekhinejad
and others ..Respondents

Mr.Simil Purohit i/b M/s Zohair and Co. for plaintiffs in support.

Mr.I.M.Pardiwala with Ms.Khushnom Daveirvala i/b M/s Mulla and Mulla and CB& C. for defendants to oppose

**CORAM: S.C.DHARMADHIKARI J**
**12th September,2007**

**P.C.**

1. Heard Mr. Purohit appearing for the plaintiffs and Mr.Pardiwala appearing for the defendants.

2. Perused the notice of motion and affidavit in support so also the affidavit in reply.

3. In my view, prayer clause (a) of the Notice of Motion cannot be granted as the Division Bench judgment/order of this Court dated 5th December, 2006 in Appeal No.833 of 2006 has gained finality.

4. In such circumstances, all that can be

considered is the request of Mr.Purohit in terms of prayer clause (b).

5. Mr.Purohit's submission is that in the event the Court Receiver hands over possession of the suit premises to the defendants, then, in that event, pending hearing and final disposal of the suit, the defendants should not transfer, alienate, encumber or part with possession of the suit premises so also should not carry on any business therefrom.

6. On the other hand, Mr.Pardiwala states that the Court Receiver was appointed of the premises and the father of the defendants was in exclusive use and occupation of the premises. The deceased handed over possession of the premises to the Court Receiver on 22nd September, 1988. The plaintiffs did not avail of the opportunity granted by the Receiver to become his agents and that is how the Court Receiver submitted the subject report on which order was passed.

7. He submits that the estimated cost of repairs is Rs.6,51,282/- as per the contractor who has been appointed from the panel of the Receiver. He submits that some attempts were made to invite

third party bids but that also has failed. In such circumstances and when the plaintiffs have failed to protect and safeguard the property they should not be permitted to occupy the same any longer.

8. Mr.Purohit has invited my attention to para 6 of the affidavit in reply and submits that perusal thereof would indicate that the defendants are not ready and willing to take possession of the premises. Therefore, the premises should not be handed over to them.

9. The order of the learned single Judge which has been affirmed by the Division Bench is clear in as much as the learned Single Judge has observed that state of the property is such that no attempts now can be made to offer it to anybody else unless the same is repaired. The repairs costs are also not being shared by the parties. In such circumstances and after perusing the photographs and other material annexed to the Receiver’s report so also giving both sides opportunity to carry out the repairs, ultimately, the learned single Judge directed the Receiver to hand over possession. The learned single Judge has after the directions discharged the Receiver and restored possession of the premises to the defendants from whom the same

was taken.

10. That order was challenged by the plaintiffs in appeal and the Division Bench after hearing both sides in paras 4 and 5 observed thus:

> "4. The plaintiffs having neglected in keeping the subject property safe despite the repeated directions by the Court Receiver and they are also not ready and willing to pay the costs of repairs, in our considered view, the continuation of Court Receiver at the instance of the plaintiffs would not be justified. The Court Receiver having been appointed at the request of the plaintiffs, it is their obligation to take all necessary steps for preservation and protection of the property despite the appointment of the Court receiver, which they have failed to do and are also not ready and willing to bear the repair costs which are estimated to be Rs.10,18,016/- In the circumstances, there is no justification for the Court Receiver to continue in respect of the subject premises. As directed by the learned single Judge, therefore, the Court Receiver stands

discharged, without passing accounts, but subject to payment of costs, charges and expenses.

5. The Court Receiver shall restore possession of the subject premises to the defendant from whom possession was taken pursuant to the order dated 22nd September, 1988."

11. I cannot go beyond this order and directions. Nothing has been pointed out to me subsequent to this order save and except stating that the parties are agreeable to expeditious hearing of the suit. The matter was repeatedly adjourned to enable the parties to put an end to the dispute amicably. It was impressed upon them that the property does not belong to either of them and what they claim is Tenancy rights therein. In such circumstances and considering the state of the property they should put an end to the dispute amicably. Despite several adjournments being taken, that attempt has failed.

12. Today also none is ready to bear the expenses of repairs nor any concrete offer is made to run the business therefrom. In such circumstances and

considering the clear statement on affidavit it is directed that the Court Receiver shall stand discharged without passing accounts but on payment of usual costs, charges and expenses and he shall abide by the Division Bench directions and hand over possession to the defendants.

13. Considering the statements on oath in para 7 of the reply, the defendants and all persons claiming through them and their servants and agents etc. are restrained from in any manner creating third party rights, encumbering alienating or transferring the suit shop/premises. In so far as carrying on business is concerned, Mr.Pardiwala states that the defendants would put their lock on the premises and keep it in that condition until the proceedings are finally concluded. He makes this statement after taking instructions from the defendants who are present in Court. In my view, keeping the premises in locked condition would also not serve any purpose. In case either of them decides to carry on repairs and conduct some business therefrom, it would be open for them to apply for modification of this order. However, considering that costs of repairs have been estimated at Rs.10,00,000/- approximately such of the parties who intends to carry on activities from

the suit stall shall deposit a sum of Rs.5,00,000/- in this Court. Upon such deposit, this Court can consider the request for modifying the instant order. This order is passed in the light of the observations of the Division Bench so also of the learned single Judge and in the peculiar facts of this case.

14. Accordingly, it is directed that the Court Receiver shall hand over possession of the property to the defendants who shall not alienate, transfer, encumber or create any third party rights so also part with possession of the suit premises until further orders of this Court. However, this order does not prevent the defendants from putting their lock on the premises. The motion stands disposed of in the above terms with no order as to costs.

15. Needless to state that the Court Receiver while being discharged, must clear the arrears of rentals in respect of the suit shop and pay them off directly to the landlord. This would be without prejudice to the rights and contentions of both sides.

16. Needless to further state that this order does not prevent the landlord from taking steps to

recover possession of the property in accordance with law. Neither the observations of the learned single Judge which are interlocutory nor the present order would be a bar for the landlord to initiate appropriate proceedings in accordance with law. Needless to further say that this order is passed in pursuance of the order of the Division Bench affirming that of the learned single Judge and none of these orders speak of surrender of rights by the parties to the present suit in favour of the landlord. In such circumstances, the apprehension of Mr.Purohit appearing for the plaintiffs that the defendants would surrender the tenancy rights is not at all well founded. However, to protect the interest of both sides it is directed that they shall maintain statusquo in sofar as tenancy of the property is concerned. Statusquo as of today to be maintained by the parties in that behalf.

17. At this stage Mr.Purohit requests that the ad-interim order passed by S.K.Shah J. (as His Lordship then was) should continue for a period of 8 weeks to enable the plaintiffs to take out appropriate proceedings.

18. This request is opposed by Mr.Pardiwala.

However, interest of justice would be sufficiently protected if the ad-interim order dated 7th March, 2007 is directed to be continued for a period of four weeks from today. Notice of motion disposed of. No costs.

**(S.C.DHARMADHIKARI J.)**